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October 23, 1997

William F. Caton
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: IB Docket No. 97-142, Notice of *Ex Parte* Submission

Dear Mr. Caton:

Duplicate copies of the enclosed *ex parte* submission in the above-referenced proceeding are being submitted on behalf of SITA (Société Internationale de Télécommunications Aéronautiques) for inclusion in the public record per the Commission's *ex parte* rules. This submission was delivered on October 23, 1997, to the addressees indicated on the attached submission.

Sincerely,

Albert Halprin
Counsel for SITA

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October 23, 1997

Regina Keeney
Chief, International Bureau
Federal Communications Commission
2000 M Street, N.W.
Eighth Floor
Washington, D.C. 20554

Dear Ms. Keeney:

Enclosed is a memorandum explaining that the Administrative Procedures Act's requirements have been satisfied in the Commission's proceeding on *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, thus permitting the Commission to remove the "one station licensee per location rule" that we discussed last week. If there is any additional information we can provide, please let us know.

Sincerely,

Albert Halprin
Counsel for SITA

cc: Laura Sherman
Douglas Klein
Roger Noel
Derek Khlopin

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# REMOVAL OF THE ONE STATION LICENSEE PER LOCATION RULE IS PERMITTED UNDER THE ADMINISTRATIVE PROCEDURES ACT

The FCC is permitted under the Administrative Procedures Act ("APA") to remove the "one station licensee per location" restriction as part of its pending rulemaking on *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*. Adequate notice exists in this proceeding to fulfill the APA's notice and comment requirements because the Commission has provided a sufficient description of the subjects and issues involved and the parties have had an opportunity to present their views. Moreover, the APA's notice requirements do not apply because the parties subject to removal of the restriction have actual notice of the issues involved and have commented extensively on this feature of the Commission's rulemaking. In addition, the APA's notice requirements are inapplicable because this proceeding, in implementing the WTO Basic Telecommunications Agreement, involves a "foreign affairs function of the United States," which makes it exempt from the APA's requirements.

## APA Notice Requirements Are Met

### The Description of Subjects and Issues Involved Is Sufficient

The APA's regulatory notice provisions are satisfied when notice by an agency includes either the "terms or substance of the proposed rule" or describes the "subjects and issues involved" in the rulemaking proceeding.[1/] The Commission has fulfilled this requirement by adequately describing the subjects and issues involved in its *Foreign Participation Notice of Proposed Rulemaking* ("Notice").[2/] Throughout its Notice, the Commission makes it clear that its primary purpose is to implement the recent WTO Basic

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1/ Administrative Procedures Act ("APA"), 5 U.S.C. § 553(b)(3) (1997) provides that notice shall include "either the terms or the substance of the proposed rule or a description of the subjects and issues involved."

2/ *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, Order and Notice of Proposed Rulemaking, IB Docket No. 97-142 (rel. June 4, 1997) ("*Foreign Participation NRPM*").

Telecommunications Agreement ("Agreement"). The Notice describes the background and scope of the Agreement and states, for example, that "we believe the benefits of the WTO Basic Telecom Agreement allow us to adopt an open entry policy for foreign affiliated carriers."[3/] The Notice also remarks that "[w]e propose now to consider all of these factors [WTO obligations and public interest considerations such as competition, national security, foreign policy, law enforcement and trade policy] in reassessing our current rules."[4/]

In addition, the Commission states in the Notice's introduction that the United States and most major trading nations "have made binding commitments to *transition rapidly from monopoly provision of basic telecommunications services to open entry* and procompetitive regulation of these services."[5/] Moreover, the terms of the WTO Agreement referenced in the rulemaking preclude market access and national treatment restrictions, including maintenance of monopolies, such as ARINC's.[6/] The Agreement also indicates that all basic telecommunications services (except certain satellite services) are covered by the Agreement. As a non-exempted basic service, aeronautical enroute services are therefore covered by the terms of the Agreement and the Commission's Notice.

The Notice also forewarns that the Agreement "promises to alter fundamentally the competitive landscape for telecommunications services."[7/] and that its new open entry policy "represents a major shift in our philosophy for regulation of the international telecommunications market."[8/] The Commission goes on to note that three of its goals are "promoting effective competition in the U.S. telecommunications market," preventing "anticompetitive conduct in the provision of international services or facilities," and encouraging "foreign governments to open their communications markets" as part of this rulemaking.[9/] The Commission's Notice is replete with many similar statements.

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3/ *Id.* at para. 5.

4/ *Id.* at para. 4.

5/ *Foreign Participation NPRM* at para. 2 (emphasis added). The Notice also states that it will impose competitive safeguards because "[t]his approach also fulfills U.S. obligations, negotiated as part of the WTO Basic Telecom Agreement, to maintain measures to prevent anticompetitive conduct." *Id.* at para. 6.

6/ *See id.* at para. 22 for Commission description of the nature of these commitments.

7/ *Id.* at para. 2.

8/ *Id.* at para. 6.

9/ *Id.* at paras. 25-27.

Against this detailed backdrop of the far-reaching and historical nature of the Basic Telecommunications Agreement and this rulemaking, the Commission identifies aeronautical enroute services as one sector that it is reviewing in light of the Agreement. The Commission specifically requested comments on its tentative conclusion "that an *ad hoc* approach is appropriate for [aeronautical enroute] licenses" and that it "see[s] no reason to change our case-by-case approach now."[10/] In response to this request for comments, SITA commented at length that compelling reasons justified a change in aeronautical enroute licensing. As part of those comments, SITA pointed out that the Commission's proposed approach violates U.S. WTO commitments, is contrary to good public policy, and is inconsistent with the FCC's long-standing approach to promoting competition and opening markets, both at home and abroad. In its submissions, SITA has provided ample evidence why the one station licensee per location restriction and indirect foreign ownership limit on aeronautical enroute licensing violate the WTO and should be modified.[11/]

ARINC has submitted detailed comments on these issues as well, arguing that its monopoly in aeronautical enroute services should be continued despite the WTO Agreement. As a result, it would be illogical to argue that ARINC does not have adequate notice of possible changes to the one station licensee per location restriction or indirect foreign ownership rules when it has directly commented on those issues and the Commission has set forth the broad scope of its rulemaking.

Removal of the One Station Licensee Per Location Rule and Indirect Foreign Ownership Restrictions Are a Logical Outgrowth of the Rulemaking

In determining whether adequate notice exists, courts also have held that the APA's notice requirement is satisfied if the content of the agency's final rule is a "logical outgrowth" of the rulemaking, even if substantially different than the agency's proposal.[12/] The Commission has recognized that the focus of the "logical outgrowth" test has been "whether . . . [the party], *ex ante*, should have anticipated that such a requirement might be

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10/ *Id.* at para 70.

11/ It is worth reemphasizing that removal of one of these restrictions but not the other would be meaningless because maintaining either restriction effectively would preclude market access in violation of the United States' WTO commitments.

12/ *See Public Service Commission v. FCC*, 906 F.2d 713 (D.C. Cir. 1989); *Natural Resources Defense Council v. Thomas*, 838 F.2d 1224 (D.C. Cir. 1988); *Aeronautical Radio Inc. v. FCC*, 928 F.2d 428 (D.C. Cir. 1992); *United Steelworkers of America v. Marshall*, 647 F.2d 1189, 1221 (D.C. Cir. 1980), cert. denied, 453 U.S. 913 (1981).

imposed."[13] In this instance, not only have the parties anticipated a change to the one station licensee per location rule and indirect foreign ownership restrictions, they have commented on it extensively.

The courts also have found that "comments raising a foreseeable possibility of agency action can be a factor in providing notice" under the APA.[14] In one case, the D.C. Circuit found adequate notice under the APA where one commenter in a proceeding suggested a regulatory approach, which prompted the Environmental Protection Agency to warn of its possible adoption of a similar rule by the agency only two weeks before promulgation.[15] The Court held that notice on the issue involved was sufficient because the industry had "at least a limited opportunity to focus a direct attack" on the issue involved and they "managed to file objections 7-10 days before the final regulations were signed."[16] Although the court recognized that time period might represent the limits for adequate notice, the instant proceeding has provided substantially more notice than this. Both ARINC and SITA submitted extensive comments well over two months ago on conforming the one station licensee per location rule and indirect foreign ownership restrictions with the United States' WTO obligations.

In addition, another case found that "although the notice did not indicate that a change in application of the standard was contemplated, the fact that numerous comments were submitted on the issue suggests that notice was adequate."[17] The courts also have found notices sufficiently descriptive of the subjects and issues involved where the notice requested comments regarding the appropriate scope of particular provisions, noting, for example, that "comments received reflected such an understanding [of the issues] and

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[13] *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 Rate Regulation*, First Order on Reconsideration, Second Report and Order and Third Further Notice of Proposed Rulemaking, 9 FCC Rcd 1164, 1177-78 (1993) (quoting *Smaller Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983)). *See also Aeronautical Radio Inc. v. FCC*, 928 F.2d at 445-446.

[14] *Association of Oil Pipe Lines v. FERC*, 83 F.3d 1424, 1432 (D.C. Cir. 1996) (referring to *Shell Oil Co. v. EPA*, 950 F.2d 741, 751 (D.C. Cir. 1991)).

[15] *Natural Resources Defense Council v. Thomas*, 838 F.2d 1224 (D.C. Cir. 1988), cert. denied *sub nom. Alabama Power Co. v. Thomas*, 488 U.S. 888 (1988).

[16] *Id.* at 1243.

[17] *Daniel Int'l Corp. V. Occupational Safety and Health Review Comm'n*, 656 F.2d 925, 932 (4th Cir. 1981) (explaining that "[t]o hold otherwise would penalize the agency for benefitting from comments received and further bureaucratize the process.").

provided additional support for the broad, final rule" adopted by the agency.[18] Also, the APA does not require an agency to publish in advance every precise proposal that it might adopt, especially when proposals are adopted in response to participants' comments in the rulemaking proceeding.[19]

As a result, the notice provisions of the APA do not require that the Commission adopt its tentative conclusion as stated.[20] The courts have found that an "agency is 'free to adjust or abandon [its] proposals in light of public comments or internal agency reconsiderations without having to start another round of rulemaking.'"[21] This flexible approach has been recognized as permissible to avoid "the absurdity that . . . the agency can learn from the comments on its proposals only at the peril of starting a new procedural round of commentary."[22]

Removal of the one station licensee per location rule and indirect foreign ownership restrictions are a logical outgrowth of the Commission's Notice and therefore are permissible under the APA. Not only has the Commission identified aeronautical enroute services as an area it is reviewing as part of its Notice, but the parties themselves have submitted extensive comments in anticipation of a change to these rules. As such, the APA's notice requirements have been fulfilled.

The Actual Notice to the Parties Also Satisfies the APA

The FCC's Notice need not fulfill the APA's notice and comment requirements, however, because the parties have actual notice that the one station licensee per location rule may be modified. The APA provides that if the persons subject to a

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18/ *United Steelworkers of America v. Schuylfill Metals Corp.*, 828 F.2d 314, 318 (5th Cir. 1987).

19/ *See Daniel Int'l Corp. V. Occupational Safety and Health Review Comm'n*, 656 F.2d 925.

20/ *See, e.g., American Iron and Steel Institute v. EPA*, 568 F.2d 284 (3d Cir. 1977) (noting that a proposed rule does not necessarily bind an agency to conduct a new round of notice and comment before it adopts a rule, even if substantially different).

21/ *Association of Oil Pipe Lines v. FERC*, 83 F.3d at 1432 (quoting *Kooritzy v. Reich*, 17 F.3d 1509, 1513 (D.C. Cir. 1994)).

22/ *United Steelworkers of America v. Schuylfill Metals Corp.*, 828 F.2d at 318 (citations omitted).

proposed rule "otherwise have actual notice," the APA's general notice requirements (including a description in the notice of the subject and issue involved) do not apply.[23/]

The FCC provides a lengthy commentary in its Notice on WTO implementation, eradication of monopolies, and opening markets, as well as identifying aeronautical enroute services as one of those service sectors it is reviewing as a result of the Agreement. In addition to the notice this provided to ARINC, SITA has extensively commented in this proceeding on the need to remove the one station licensee per location rule and indirect foreign ownership restrictions to comply with WTO provisions. ARINC has been served with these comments and is aware of the issues involved. Indeed, ARINC has filed its own comments that address these issues and argued for continued *ad hoc* licensing to maintain its monopoly. As a result of their extensive comments and clear understanding of the issues involved, the parties have actual notice.

The FCC has recognized that the APA provides that "actual notice to persons subject thereto is sufficient for Rule Making of particular applicability."[24/] Similarly, courts have also recognized the adequacy of actual notice in satisfying the APA.[25/] For example, the D.C. Circuit noted that "[i]t is difficult to see how the [party involved] was denied adequate notice when it filed both comments and reply comments specifically on th[e] issue" involved.[26/] This is the situation in this rulemaking. ARINC is on notice as to these issues and participated in this rulemaking process in an informed manner. The APA requires no more. Furthermore, the underlying aim of the APA's notice requirements (allowing parties an opportunity to participate and providing agencies with sufficient information for informed decision-making) is met here.

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[23/] APA § 553(b) stating that "General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto . . . otherwise have actual notice thereof in accordance with law."

[24/] *Prescription of Revised Percentages of Depreciation and Policy Regarding Effective Date of Depreciation Prescriptions*, Memorandum Opinion and Order, 6 FCC Rcd 750, 751 (1991) (noting that "[n]othing in the APA requires participation of anyone other than the carriers involved in a depreciation prescription proceeding.").

[25/] *See, e.g., Public Service Commission v. FCC*, 906 F.2d 713.

[26/] *Public Service Commission v. FCC*, 906 F.2d at 718. In the hearing context, *see Southern Railway Company v. United States*, 412 F. Supp. 1122, 1142 (D.D.C. 1976) (finding adequate notice where a notice "revealed the breadth of the expanded investigation, as an inquiry into 'the propriety if any, of modifying, amending or changing in any respect our approval, findings and order in prior proceedings . . .'" and the plaintiffs were "put on actual notice that [the particular document] was in issue . . . .").

The Foreign Affairs Exception to APA Notice Requirements Applies to this Proceeding

The FCC also is not constrained by the notice provisions of the APA because removal of the one station licensee per location restriction as part of its WTO implementation in the *Foreign Participation* proceeding involves a foreign affairs function of the United States that is exempt from the APA's requirements. The APA explicitly provides that its rulemaking provisions, including notice requirements, do not apply to actions involving "foreign affairs functions of the United States."[27/]

Courts have clearly held that regulations implementing international agreements, as does the FCC's *Foreign Participation* proceeding, are not subject to the APA's notice and comment requirements. For example, the D.C. Circuit recently ruled that APA notice and comment requirements did not apply to regulations implementing a memorandum of understanding between Mexico and the United States.[28/]

Furthermore, this exception has been applied specifically to agreements involving the FCC. In *WBEN v. United States*, the court found that the foreign affairs exception of the APA applied to an agreement with Canada and that notice and comment requirements therefore did not apply to the Commission.[29/]

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27/ APA § 553(a), which provides that: "This [rulemaking] section applies, according to the provisions thereof, except to the extent that there is involved -- (1) a military or foreign affairs function of the United States."

28/ *See International Brotherhood of Teamsters v. Pena*, 17 F.3d 1478, (D.C. Cir. 1994). The court recognized that failure to implement the international agreement would mean that "the United States would have been reneging on international obligations if the [agency] had not issued the rule." *Id.* at 1486. Also, *see generally Mast Industries, Inc. v. Regan*, 596 F. Supp. 1567 (C.I.T. 1984) (regulations defining or altering import quotas in bilateral agreement directly involved a foreign affairs function and thus are exempt from APA notice requirements); *Helms v. Secretary of Treasury*, 721 F. Supp. 1354 (D.D.C. 1989) (regulations implementing Comprehensive Anti-Apartheid Act of 1986 exempted from APA notice provisions because purpose of regulations was directly related to foreign affairs function.)

29/ 396 F.2d 601, 616 (2d Cir. 1968), *cert. denied* 393 U.S. 914 (1968). In a different factual aspect of that case, involving another party, the court determined that the foreign affairs exception did not apply where the international agreement did not require a change to the Commission's rule. However, as explained in detail in SITA's submissions in the *Foreign Participation* proceeding, maintenance of a monopoly under the one station licensee per location rule is contrary to the WTO and is inconsistent with the United States' commitments. As such, removing that restriction to comply with the WTO Agreement falls within the foreign affairs exception.

The Commission's implementation of the Basic Telecommunications Agreement, which involves not just a bilateral agreement or a "memorandum of understanding," but a multilateral international agreement involving 68 other countries and negotiated by the FCC and the United States Trade Representative's Office, clearly involves a foreign affairs function of the United States. In fact, primary responsibility for implementing the Agreement by the January 1, 1998 deadline rests with the FCC and this proceeding.

Conclusion

The Commission is authorized under the APA to remove the one station licensee per location restriction as part of its *Foreign Participation* proceeding. The Commission has sufficiently described the subjects and issues involved in this proceeding, including the broad scope of the Basic Telecommunications Agreement obligations it seeks to implement and identifying aeronautical enroute services as one sector that it is reviewing in light of the Agreement. In addition, the parties subject to a change in the rule have adequate notice as reflected by their extensive commentary on the substance of this issue. Moreover, adequate notice also exists because modification of the one station licensee per location rule is a logical outgrowth of this proceeding.

Despite fulfilling the APA's notice requirements, however, the Commission is not obliged to do so. The Commission is exempt from such requirements on two separate grounds. First, the parties subject to the rule change have actual notice of a possible change (and have commented on it) and thus the APA's general notice requirements do not apply. This fits with the APA's aim of providing parties and opportunity to comment on relevant issues, which they have done. Second, this rulemaking, which implements the WTO Agreement, involves a foreign affairs function of the United States and is therefore exempt from notice requirements under the terms of the APA.

As a result, the Commission is authorized under the APA to remove the one station licensee per location rule as part of its *Foreign Participation* rulemaking.